Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
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80-2208

SUPREME COURT NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

ERNEST L. CITRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION
NO: 7-80926
Entered:
November 29, 1978

ERNEST L. CITRON,

Defendant.
_____/

OPINION

Defendant Ernest L. Citron, a lawyer (Citron), was indicted on three counts of tax evasion for filing fraudulent personal income tax returns for the calender years 1970, 1971 and 1972. Following arraignment on the indictment he filed a waiver of his right to a speedy trial and moved for suppression of certain evidence and for the return of certain business records. An extensive

evidentiary hearing was held and voluminous briefs were filed. I am of the opinion, having heard arguments, that Citron's motion for suppression of evidence and return of business must be denied.

I. PRIOR HISTORY

This case began in September 1973 when William A. Engelson (Engelson), a revenue agent of the Internal Revenue Service, requisitioned Citron's tax returns for the calendar years 1970, 1971, and 1972 and began an audit. That audit continued until approximately February 15, 1974, when Engelson, after consultation with his supervisor, referred the case to the IRS Intelligence Division. On February 20, 1974, Citron retained tax counsel. While the record does not specify it is reasonable to conclude that between February 20, 1974, and the date proceedings begain in this

court in 1977, there were numerous conferences between Citron's counsel and the IRS.

What led Citron to this court on August 2, 1977, was his belief that IRS was amassing evidence against him, based upon his tax returns of 1970, 1971 and 1972, which evidence was shortly to be submitted to a federal grand jury to determine whether an indictment should be returned against him. Thereupon, Citron initiated an unusual motion to suppress evidence to return business records and to enjoin further prosecution. His motion was referred to the United States District Judge then in charge of the Miscellaneous Docket, Honorable James P. Churchill.

In an evidentiary hearing, which took place over a portion of two days, Judge Churchill heard the testimony of numerous witnesses, listened to arguments, and studied briefs. Judge

Churchill was obviously troubled with this motion in pre-indictment form since it involved the claimed seizure of evidence. In denying relief he pointed out that the case law indicated that a pre-indictment motion of this character ought to be dismissed if the moving party has an otherwise adequate remedy, or cannot show irreparable injury. The thrust of the opinion denying relief was that the court ought not to exercise jurisdiction or grant relief unless there was a clear violation of the claimant's constitutional rights. Judge Churchill held that there was an important question of witness credibility, and he concluded that if a violation of Citron's constitutional rights could be demonstrated it would best be done after an indictment had issued, with the specific charges in the indictment before the reviewing court. Accordingly, in August 3, 1977, he declined to exercise jurisdiction.

On August 17, 1977, Citron was indicted and shortly thereafter refiled the motion for suppression of evidence and the return of business records now before me. By stipulation, the transcript of the hearing before Judge Churchill has been made a part of the record in this case.

II. THE LAW

The discussion of applicable law must necessarily begin with 26 U.S.C. § 7602. It provides in part:

> § 7602. Exaination of books and witnesses
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquriy; ...

Noteworthy is the basic stated statutory purpose:

> ... ascertaining the correctness of any return ... and determining the liability of any person for any internal revenue tax ...

In order for the Internal Revenue Service to carry out this purpose the statute allows an agent "to examine any books, records or other data which may be relevant or material to such inquiry ...." Of course, a revenue agent conducting an investigation under this section must do so within the parameters defined by the Fourth and Fifth Amendments. The Fourth Amendment particularly does not apply only when an individual is suspected of criminal behavior. Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

In a tax fraud case it is often asserted by the taxpayer who is the object of the audit that since he or she does not know of the possible criminal

repercussions, United States v. Stamp, 458 F.2d 759 (D.C. Cir. 1971), cert. denied, 406 U.S. 975, rehearing denied, 409 U.S. 900, involved in a civil tax audit, a Fourth Amendment right is violated if he or she is not fully informed of the purposes of the audit. This is not so.

In this case Citron says that since Engelson suspected Citron of tax fraud or other criminal behavior before conducting the audit, the consent obtained by Engelson to examine Citron's tax books and records was not valid because Citron was informed of these suspicions. He argues that absent this information, the consent is invalid and that the use of such materials so obtained in a subsequent prosecution in turn violates both his Fourth and Fifth Amendment rights.

A civil audit must necessarily begin with an examination of a taxpayer's books and records. Realistically, an audit begins with some suspicion in the mind of a revenue agent, usually a suspicion that the amount of tax reported and paid is not correct and that there may be additional tax liability; such audits are regularly made following consent rountinely obtained and are completely consonant with the objectives and means set forth in 26 U.S.C. § 7602. See United States v. Sclafani, 265 F.2d 408, 415 (2d Cir. 1959):

> The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as may be incident to a voluntary disclosure. We hold that Sclafani was so apprised by the warning inherent in the request when Agent Sonkin identified himself and disclosed his purpose to audit certain returns of the corporation. (emphasis supplied)

If a revenue agent does suspect tax fraud before he begins his audit, but his purpose is still civil, that is to ascertain whether a correct tax has been reported and whether there is liability for any additional tax, he may conduct an audit having obtained consent so to do without disclosing that he suspects tax fraud. See United States v. Stamp, supra. It is equally clear that he may not induce consent to examine records by trickery or misrepresentation. See United States v. Tweel, 550 F.2d 297 (5th Cir. 1977). In Tweel, taxpayer's accountant called the revenue agent who desired to audit his client's tax returns. The accountant had just been through an audit of prior years' returns with a special agent. To discover whether his client was the object of a criminal tax investigation the accountant asked the agent whether a special agent was

involved in the new investigation. The revenue agent replied that no special agent was involved. This response led the accountant to believe that the revenue agent was simply conducting a civil audit. What the revenue agent did not say was that this audit was being conducted at the special request of the Organized Crime and Racketeering Section of the Department of Justice. The court in Tweel held that the agent's failure to apprise the accountant of the obvious criminal nature of the investigation was deceptive, but quoted with approval, United States v. Prudden, 414 F.2d 1021, 1033 (5th Cir. 1970), cert. denied, 400 U.S. 831 (1970), for this holding:

> We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to

> establish the existence of fraud, and this showing must be clear and convincing. (emphasis supplied)
>
> The court in Prudden also stated that:
>
> Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. At. p. 1032.

Thus, where there is no legal or moral duty to speak, a revenue agent is not required to advise a taxpayer of his suspicions of the tax fraud. The fact that a taxpayer's returns are under audit is sufficient warning. See United States v. Stribling, 437 F.2d 765, 772 (6th Cir. 1971), cert. denied, 402 U.S. 973, citing with approval, United States v. Squeri, 398 F.2d 785, 788 (2d. Cir. 1968), where the court said:

> [T]he information that a taxpayer's returns are under audit gives sufficient notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they speak to him.

See also, United States v. Marra, 481 F.2d 1196, 1203 (6th Cir. 1973), cert. denied, 414 U.S. 1114 (quoting Prudden supra, at 1033).

So far this discussion has related to the duty of a revenue agent in obtaining consent who is involved in only one investigation. Where, as here, a revenue agent assigned to do an audit of the defendant's tax returns is also working with a special agent is preparing a criminal tax case against a third person (Peshkopia, with whom Citron had had certain relationships) is the result different?

United States v. Stamp, supra, is informative. In this case evidence obtained in tax audits by revenue agents was permitted to be used in cases resulting in convictions of crimes other than tax crimes. Two lawyers, Leigh and Rogers were partners. Leigh was under criminal tax investigation and for other

suspected criminal activity. He was informed that he was under criminal tax investigation by both the special agent, McElroy, and the revenue agent, Hansell, who were working together as a team. McElroy also wanted to see certain records in the possession of Rogers. To obtain these records he visited Rogers and told him that he (Rogers) was not under investigation. McElroy received the desired records and on subsequent occasions reinterviewed Rogers. One year later Rogers was subjected to an audit. While this was going on, a revenue agent, one Evangelist, was sent to see Reynolds, President of Reynolds Construction Company, to audit his tax returns and his wife's and to obtain all financial transactions between Reynolds and Leigh. McElroy made this request of Evangelist based upon his suspicion that Reynolds had bribed Leigh. Evangelist was given permission to see the books of

Reynolds Construction Company by one, Steele, an accountant and secretary-treasurer of the company. He did not inform Steele of his suspicions. Later Leigh, Rogers and Reynolds were convicted of conspiracy to commit the crimes of false pretences and forgery, and certain other substantive crimes. One of the matters raised on appeal was the denial of motions to suppress evidence which claimed that consent was improperly obtained. The court in Stamp, in a comprehensive statement, of applicable law, held that if revenue agents have valid civil tax audit purposes, even though they tangentially suggest criminal behavior, either tax or non-tax related, they do obtain valid consents to examine books and records, even though they do not disclose their suspicions, provided that such civil tax investigations do not go beyond what is normally sought in civil tax audits.

Stamp is interesting also because of its factual parallel to this case. In the motion to suppress it was claimed that Evangelist, a revenue agent, had informed Steele that his audit of the Reynolds' returns was a "routine" audit. The court readily agreed that if this is what Evangelist had said it would be misleading since the audit's purpose was partly a search for criminal evidence. Having concluded factually that Evangelist did not mislead Steele, the court then considered whether the examination actually conducted was within the permissible scope of a civil tax audit, and it concluded that the materials that were obtained were within the scope of a routine civil audit and thus were not beyond the scope of Steele's consent.

It is clear that a consent from a taxpayer to do a tax audit is valid even though the revenue agent is then working with a special agent on a related case

which may involve criminal tax or non-tax liability, and even though the revenue agent suspects tax fraud or other criminal behavior on the part of the taxpayer provided that his state of mind contains no more suspicion than that and provided he does not mislead the taxpayer through deceptive means. As soon as the revenue agent's suspicions reach the point at which they ripen into an opinion that there may be tax fraud or criminal tax liability, he must refer the case to the Intelligence Division and the taxpayer informed if the investigation is to continue.

Evidence so obtained is validly obtained and may be used in a subsequent prosecution provided such evidence is of the character normally obtained through an examination of books and records

relating to the correctness of a tax return or the liability for additional tax.

III. FACTS

In further evidentiary hearings before me in March, July, and September of 1978, much of the testimony presented to Judge Churchill was repeated. Additional testimony and documentary evidence was introduced and the scope of the hearing broadened.

From all this the following appears: Citron is a lawyer specializing in personal injury and workers' compensation cases. He has acquired business interests both relating to and falling outside his interest in the practice of law. He is a part owner of the building in which his law offices are located. In 1972 he purchased a beauty shop from one Tako Peshkopia (Peshkopia) for whom Citron had acted as an attorney. It was

this professional and business relationship between Citron and Peshkopia that may have led to the IRS's interest in Citron. Peshkopia had apparently been involved in drug trafficking and as a consequence, was indicted on narcotics charges. He pleaded guilty in this court to these charges in April 1973 and was sentenced subsequently to an eight year period of incarceration. Contemporaneous with the narcotics investigation the IRS also investigated Peshkopia for criminal tax evasion. Engelson was assigned to the Peshkopia case along with Special Agent Thomas Kraft.

Engelson learned from the Peshkopia assignment that Citron was Peshkopia's attorney. He also discovered that Citron had purchased the beauty shop from Peshkopia and that the shop's records indicated that, within a six month period (June 1972 through December

1972), sums of money in excess of $220,000 had been deposited in the beauty shop's bank account in the Oakland National Bank, were later withdrawn, and were finally redeposited in Citron's commercial account with the City National Bank. According to the "T-letter" (Government's Exhibit 2), Engelson, "thinging that that these records were tainted or might have stemmed from some narcotics activity," requisitioned Citron's returns for 1970, 1971, and 1972. On September 5, 1973, Engelson telephoned Citron to make an appointment and he began the audit the following day.

For approximately 27 years Citron has been an attorney licensed to practice his profession in Michigan. His offices are located at 2222 Woodward Avenue in Detroit, Michigan. On September 6, 1973, Engelson and Citron met at this office. The men discussed

their mutual background in an apparently amiable fashion. They learned that they shared a common national origin and came from the same ethnic background. This amiability continued during several subsequent meetings. Citron admitted that on the occasions when Engelson was present in his office Engelson asked many questions to which Citron willingly gave answers. Specifically, Citron testified: "I thought that we would have a nice, smooth audit ..." Thus, Citron permitted Engelson full access to all of his records with one condition, to which Engelson acceded, that Engelson not invade the privacy rights of any legal clients or use any information obtained in Citron's audit against those clients. Citron's records were apparently not maintained in any one place in his office. He said that he was a poor record keeper and it was

often necessary for his secretary, Ms. Pat Kowalski, to search for the needed records. Engelson was allowed to remain at Citron's office as long as he pleased to examine records. According to Gerald Gattorn, an associate of Citron's, Engelson frequently remained at the office after everyone else had left for the day; Citron admitted that there were occasions when he left the office with Engelson still there. Apparently, Citron at one time even considered giving Engelson a key to the office; as Gattorn testified, Citron asked "[me] if there was a key I would give him [Engelson]," and "[I said] it was not necessary if he would exit out of the back door." It is clear from this testimony that Engelson was permitted to look at any of Citron's records at Citron's office and to make any copies of those records.

What is not immediately clear is whether Engelson could take business records from Citron's office to his own office in the Federal Building. This factual issue is important. Citron testified that he had given Engelson permission to take only certain peg registers to his office (peg registers were defined as a system of recording information written on checks as carbon copies). Engelson countered that Citron had given him full permission to take specific business records from the Citron office to the Federal Building and that he had done so on two or three occasions. He further stated that on each occasion he sought and received Citron's personal consent. In his motion Citron makes three claims: (1) that Engelson was guilty of misrepresentation and trickery in informing Citron that the investigation was to be

a routine audit; (2) that Engelson took certain records from Citron's office without consent; (3) that contrary to IRS manual procedures, Engelson did not give Citron receipts for the records taken from the office.

In evaluating these claims, the credibility of Engelson and Citron becomes an important issue. Engelson is a revenue agent of some 30 years experience. Undoubtedly over that period he had audited the records of many taxpayers and has adopted an approach calculated to be disarming. The seemingly friendly way in which Engelson and Citron met supports this. Citron, too, is a man of considerable experience, ability, and undoubted savior-faire. The evidence indicates that at the time of the audit he had submitted a net worth statement to a bank showing net assets of $1,389,920. In a material

sense, therefore, he is a successful lawyer and businessman. Citron surely must have known when Engelson first telephoned him and later came to his office to advise him that his returns for 1970, 1971, and 1972 would be subjected to an audit, that his former client Peshkopia faced several serious problems. He also knew that the beauty shop purchased from Peshkopia involved substantial sums of money and that Peshkopia was closely associated with him both professionally and personally. For example, the testimony indicated that on several occasions Peshkopia was observed riding in Citron's automobile.

I must accordingly conclude that, when Engelson called upon Citron, Citron was immediately aware of the personal risks accompanying a tax audit. Notwithstanding this awareness he chose deliberately to disarm Engelson by a

show of friendliness and openness which he solidified by making all of his tax records available to Engelson. He admits that he permitted Engelson to take certain peg registers from the office and allowed him the free reign to his office. That being so, I now find it incredible that Citron was in any way misled (assuming it was said) by Engelson's statement that this was a routine audit though I note that Engelson denies that he characterized the audit in such a fashion. I must conclude that, in any event, Engelson did not misrepresent his purpose. I find it highly unlikely that a lawyer who gave a revenue agent the full run of his office, sought to get him a key for that office, and gave him permission to take records from the office without any restriction as to copying, and who on occasion left while the revenue agent

was still working on records in his office, can credibly maintain that he did not also permit the revenue agent to take other records from the office. While it would have been a prudent course of conduct for Engelson to have given receipts each time he took records from the office, I cannot conclude that his failure to do so means that he had no permission to take these records.

In making my findings I place weight on the fact that both Engelson and Citron appear to be "street wise." Neither appears to be easily misled by what the other would do. Citron matched Engelson's calculately disarming approach with calculated and knowledgeable responses. Each concluded that his own approach would further his own interests. It is equally difficult for me to

believe that Citron did not give his consent to Engelson to take records from the office as it is difficult for me to conclude that Engelson would risk vitiating the entire case by taking records without Citron's consent.

Engelson referred the case to the Intelligence Division on February 15, 1974. What precipitated the referral letter was Engelson's audit which led him to compare client's names for whom Citron had negotiated settlements (and from whom he was therefore entitled to contingent fees) with the cash receipts book. It was noted on February 13, 1974 that some of these fees were not recorded in the cash receipts book. Engelson asked Citron about this. When Engelson return to Citron's office on February 14, Engelson saw that the receipt book had been altered -- names of clients and fee amounts had been added. Engelson

thereupon made the referral and Citron retained tax counsel. It is clear from the record prepared for the evidentiary hearing that Engelson obtained no evidence that Citron was engaged in any non-tax related conduct such as drug trafficking.

I find that when Engelson went to Citron's office as a revenue agent he had two purposes in mind: first, in association with Special Agent Kraft, he was conducting a criminal tax investigation on Peshkopia, and, second, based upon his suspicions that Citron's tax returns might be incorrect, he was conducting a civil tax investigation of Citron.

Having so found, I must now determine whether that dual purpose as Engelson carried it out resulted in a violation of Citron's constitutional rights. Additionally, I must determine

whether Engelson's suspicion that Citron might be engaged in narcotics activity changes the result. Additionally, and in any event, I am required to make findings as to the scope of the consent obtained.

IV. CONCLUSIONS

This is not a summons case. What is involved here is whether or not Engelson engaged in deception or trickery in obtaining Citron's consent to examine his records and to take them from his office. Even so, the teaching of the summons cases is helpful. In United States v. LaSalle National Bank, Crim L. Week 3129, slip opinion 6/19/78, p. 10, the Supreme Court observed that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." See Donaldson v. United States, 400 U.S.

517 (1971); United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973); United States v. Held, 435 F.2d 1361 (6th Cir. 1970). Even though there may be a criminal purpose for the audit, i.e., a suspicion as to tax fraud, the audit is not unreasonable if there is also present the purpose of "ascertaining the correctness of the return" and the determination of liability for (additional) taxes.

I conclude that when Engelson went to Citron's office to audit his returns he had a legitimate purpose to determine their correctness. That he may also have suspected that the tax returns were tainted or that they might not be correct becuase "there might be some narcotics activity" does not make his examination illegal or the consent obtained to look at the records and copy them invalid.

I conclude that he did not engage in trickery or deception in obtaining Citron's consent. No where in this record do I find any such showing by clear and convincing evidence.

I conclude that Engelson acted within the scope of the consent he obtained. The consent carries with it an implied authority to copy documents (counsel for defendant conceded this) and this implication to permit copying, I conclude, also permits copying by mechanical means. In McGarry v. Riley, 363 F.2d 421 (1st Cir. 1966), cert. denied, 385 U.S. 969 (1966), the court stated "it is inconceivable today that a right to examine and copy from voluminous files does not also assume that photostating can be done." Having found that Citron gave Engelson permission to take records from his office I conclude that this permission was in no way

vitiated because Engelson did not give Citron receipts for the records so taken. Finally, I conclude that Citron's Fifth Amendment rights were in no way violated.

Accordingly, Citron's motion to suppress and for return of business records is denied.

An appropriate order may be submitted.

/s/ John Feikens

JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v. Criminal No.

7-80926

ERNEST L. CITRON,

Defendant

_____/

OPINION

On August 17, 1977, Ernest L. Citron (Citron) was charged in a three-count indictment with wilfully attempting to evade and defeat a substantial portion of his and his wife's income tax liabilities for the years 1970 (Count 1), 1971 (Count 2), and 1972 (Count 3), in violation of Title 26, U.S.C., Section 7201. The indictment

alleges that Citron attempted to evade his taxes by filing false and fraudulent income tax returns underreporting his and his wife's joint taxable income and tax liability for each of the years 1970, 1971, and 1972, which allegations he denied.

Following evidentiary hearings before me in March, July and September of 1978*, I denied defendant's motion for suppression of evidence and return of business records in an opinion dated November 29, 1978. A jury trial was waived, and the case was tried before me.

On December 12, 1979, at the close of the government's case in the trial on the merits, I denied defendant's motion for judgement of acquittal under Rule

* The transcript of a pre-indictment hearing in August 1977 before Judge Churchill on Citron's motion to suppress was made part of the record in this case by stipulation.

29(a) of the Federal Rules of Criminal Procedure (F.R.Cr.P.). The defendant presented no evidence at trial except for the elicited on cross-examination. On May 1, 1980, defendant renewed his pretrial motion for suppression of evidence and raised, in the alternative, a motion for rehearing. At the same time defendant also moved for a judgment of acquittal under Rule 29(b), F.R.Cr.P., contending that the government had failed to establish beyond a reasonable doubt that he had violated Section 7201 of the Internal Revenue Code. This opinion follows as required by the Federal Rules of Criminal Procedure.

Citron has been an attorney licensed to practice in Michigan for over 27 years and has an office located at 2222 Woodward Avenue, Detroit, Michigan. During the years in question Citron practiced law under the name

Citron and Citron, and beginning in 1972, Citron, Citron and Weiss, although for income tax purposes the defendant was sole proprietor. Citron reported his own income as that of a sole proprietor and no partnership returns were ever filed by him or on his behalf during the tax years in question. Citron paid legal fees to two attorneys sharing his office space, William Eugene Citron and Gerald Weiss, which fees Citron deducted as expenses on his tax returns. He issued Forms 1099 to William Citron and Weiss each year reflecting these payments.

In the years 1970 through 1972, Citron's legal business consisted primarily of personal injury claims, in addition to some worker's compensation claims, divorce actions, and estate actions. When a claim settled or litigation concluded, Citron received checks payable to the client and himself or to

the client and Citron's firm name, which Citron would negotiate and deposit in City National Bank account number 309-012241 in Detroit, Michigan. He would then remit a portion of the settlement to the client by check. At the conclusion of a case, a settlement sheet indicating the distribution and apportionment of the award was prepared by Citron's secretary and placed in the case folder.

There is evidence that Citron substantially controlled the finances of all his cases, even where other attorneys were involved. Charles Shere, an attorney associated with Citron in the litigation of several cases during the years at issue, testified that contrary to the business custom, Citron distributed funds received for cases referred by Citron to Shere for trial. Isadore Goldbaum, an attorney who shared office space with defendant at 2222 Woodward

Avenue, testified that Citron paid the bills for joint expenses such as telephone service and secretaries.

Citron's financial and business sophistication is evidenced by his extensive banking practice and dealings with brokerage firms. Records of Citron's business bank account indicate that he made deposits and withdrawals of over 14 million in 1970, over 9 million in 1971, and over 18 million in 1972 in a practice known as "check-kiting," which relies on delays in processing checks to create artifical account balances. During 1970, 1971, and 1972, Citron maintained both margin and cash accounts with five brokerage firms.

The case began in September of 1973 when William A. Engelson (Engelson), a revenue agent of the Internal Revenue Service, requisitioned Citron's tax returns for the calendar years 1970, 1971, and 1972, and began an audit. On

January 10, 1974, Engelson began copying by hand Citron's basic business income record, a cash receipts book. At Citron's suggestion, Engelson took the book with him at the end of the day to photocopy it and returned it the following day. On February 13, 1974, Engelson presented Citron with a list of names included in Citron's check registers which has been turned over in September 1973, but which did not appear in the receipts book. Citron stated to Engelson that his receipt book reflected all income received. That evening Citron altered the receipts records adding fees and increasing some fees previously understated. When Engelson noted the changes the next day and asked Citron about them, Citron stated he had lied to Engelson the previous day. Engelson listed the alterations he observed, inspected certain client

folders, and calculated the income in excess of that reported in Citron's 1970, 1971 and 1972 tax returns. On February 15, 1974, Engelson, upon consultation with his supervisor, referred to the case to the IRS Intelligence Division.

The defendant's individual income tax returns for those three years were prepared by Ralph Woronoff, a certified public accountant, from summary totals of income, expenses and deductions, and lists of stock market transactions provided to him by the defendant. Citron would provide his accountant with the yearly totals of the income in the receipts book, plus the yearly retainer he received from Fleisch Sportswear, Inc. The evidence establishes that this information provided to Woronoff, as well as the returns signed and filed by Citron and his wife in 1970, 1971, and 1972 were false and fraudulent.

The procedure followed by agents investigation Citron's records was to obtain copies of items deposited into the law firm bank account for the tax years in question which were payable to clients of the defendant and included the name of Ernest Citron, Citron and Citron, or Citron, Citron and Weiss. The deposits were compared with defendant's cash receipts book to determine which of the checks had the appearance of legal fees to Citron. The makers of the checks, usually insurance companies, were contacted to locate addresses of the payees. Agents met with those claimants to determine the amount of legal fees paid to defendant, if any. Agents also obtained probate court records of cases handled by Citron. Where the amount reportedly paid to Citron was not found in his cash receipts book or was more than the

amount recorded in the book, the difference was deemed unreported taxable income to defendant. After credit for proper deductions, a corrected tax was computed and compared with the taxes paid by defendant. The differences was deemed due and owing.

The government's summary expert, Robert M. Campbell, a revenue agent employed by the Internal Revenue Service, Detroit, Michigan, testified that Citron's income tax returns for 1970, 1971 and 1972 understate his income from his legal practice and from interest received. For 1971 the cash receipts book itself reflects additional income of $45,248.76 not provided to Woronoff and hence not reflected on that year's tax return.

Campbell's analysis of the documents in evidence, the stipulations of the parties, and testimony at trial led

him to conclude that additional amounts of legal income totaling $18,189.78 in 1970, $50,020.81 in 1971, and $52,171.46 in 1972 were not reported in the receipts book or returns. The addition, the government's expert concluded Citron had received and failed to report interest income of $814.21 in 1970, $3,115.80 in 1971, and $1,872.05 in 1972. He determined Citron owed an additional tax of $5,835.48 in 1970, $51,112.37 in 1971 and $24,745.75 in 1972.

Motion to Suppress Evidence, or Alternatively, for a Rehearing

Defendant does not raise any significant additional law or facts in his motion which compel a result difference than the one I reached in my opinion of November 29, 1979. Therefore, I incorporate by reference that earlier opinion

in denying defendant's renewed motion to suppress evidence. In my opinion of November 29, 1979, I concluded that revenue agent Engelson had two purposes in going to Citron's office to audit his tax returns: to conduct a civil tax investigation of Citron and to further the criminal tax investigation of Citron's client, Tako Peshkopia. The fact that Engelson may have also suspected that Citron's records were tainted by evidence of illegal narcotics activity did not make his examination illegal or vitiate defendant's consent to the audit. I also concluded that Engelson did not engage in trickery or deception to obtain Citron's consent and that Engelson acted within the scope of the consent he obtained.

Defendant's reference to trial testimony which pinpoints the date when Engelson's focus shifted from his

suspicion of tainted records to defendant's tax returns adds nothing to my prior ruling. There is an ample basis in the record for finding a duality in Engelson's motive in conducting the audit, and the length of time that the dual purpose existed does not, as defendant suggests, amount to bad faith which negates the existence of the legitimate purpose.

Defendant also makes much of trial testimony regarding the date of assignment of defendant's tax returns to revenue agent Engelson. Defendant argues that trial testimony of Engelson reveals a material misstatement not revealed in pre-trial testimony--namely, that Engelson initially told Citron he had been "assigned" the audit of defendant's returns for 1970, 1971, and 1972. At trial it was determined that only the 1971 tax return had been

assigned to Engelson prior to his first visit to Citron's office. Engelson testified that the other returns had been "requisitioned" and he had been "awaiting the assignment" at the time the audit began. Even though Engelson admits he may have "misused the term assigned," I do not find this was a material misrepresentation or one that effectively tricked the defendant. Defendant suggests that Engelson's purpose was to deceive the defendant into thinking that his inquiry was in the nature of a routine audit. Insofar as Citron was an experienced attorney he must have been aware of the potential criminal aspects of any tax audit. Moreover, Citron was certainly not deceived as to the assignment of the 1972 return since at the start of the audit Citron had not yet filed that return. Defendant does not make a clear showing that he was tricked or deceived

by Engelson's comment that he had been assigned the audit of all three returns. See, United States v. Nuth, 605 F.2d 229 (6th Cir. 1979).

Defendant's rehearing motion requests a reopening of the record to ask seven questions of Engelson's supervisor, Ted Eckhardt, regarding any role he may have had in initiating the audit of defendant's tax returns. Eckhardt's testimony is not crucial to the outcome of the case. Engelson's underlying purpose, which included a legitimate motive in conducting the audit, will remain the same regardless of Eckhardt's testimony. Consequently, defendant's motion for a rehearing is denied.

Motion for Judgment of Acquittal

Citron has been charged with violating Section 7201 of the Internal Revenue Code of 1954, which provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution.

To sustain a conviction for willful attempted evasion of income taxes, the government must establish as to each count that there was a substantial tax due and owing, that the defendant attempted to evade this income tax, and that the attempted evasion was willful. See, Sansone v. United States, 380 U.S. 343, 351 (1965; Spies v. United States, 317 U.S. 492 (1943).

Defendant's motion for judgment of acquittal is based on his contention that the government did not establish his guilt beyond a reasonable doubt because it failed to establish that unreported income was attributable

solely to Citron. Defendant suggests that the government's failure to follow exculpatory leads leaves the court with the reasonable alternate probability that the income is, at least in part, allocable to the two other attorneys associated in a partnership with Ernest Citron -- William Citron and Gerald Weiss.

Defendant misstates the nature of the government's proof by calling it a bank deposit analysis. The government used at trial, as it indicated in its trial brief, a specific items method of proof. Stipulations were entered by the government and defendant which detailed amounts received by defendant and amounts remitted to clients from settlements or completed litigation. The government's summary sheet admitted into evidence sets forth the specific items of income it was relying on in its determination that defendant received

income in excess of that reported in 1970, 1971 and 1972.

Since it did not employ a circumstantial method of proving unreported income, the government is not obligated in this case to negate taxable leads. United States v. Suskin, 450 F.2d 596, 598 (2nd Cir. 1971); United States v. Shavin, 320 F.2d 308, 311 (7th Cir. 1963), cert. denied, 375 U.S. 944 (1963); Swallow v. United States, 307 F.2d 81 (10th Cir. 1962), cert. denied, 371 U.S. 950 (1963). Once the government has demonstrated unreported receipts having the appearance of income, the burden is on the defendant to explain the receipts and he remains silent at his peril. United States v. Hiett, 581 F.2d 1199, 1202 (5th Cir. 1978); United States v. Slut sky, 487 F.2d 832, 842 (2nd Cir. 1973) cert. denied, 416 U.S. 937 (1974) United States v. Lacob, 416

F.2d 756, 760 (7th Cir. 1969), cert. denied, 396 U.S. 1059 (1970).

I wish to emphasize, as the court did in United States v. Hiett, supra, at 1202, that this holding in no way shifts the burden of proof to the defendant. He is not required to testify in court or to supply leads. The burden of establishing all elements of the offense, including the taxable source, remains on the government throughout the trial. However, once the government has established a prima facie case, the defendant by remaining silent assumes the risk that the trier of fact will believe the government's witnesses and find him guilty. Id.

The evidence in this case leads to a conclusion that the government has established beyond a reasonable doubt that Ernest L. Citron had additional taxable income in the years 1970, 1971 and 1972; that he filed false income tax

returns understating his taxable income and tax due and owing for each year; and that such actions were willful.

There is sufficient evidence in this case to prove that the checks at issue payable to Citron and Citron, or Citron, Citron and Weiss were income to Ernest Citron, and not allocable to his partners. The record shows that Citron substantially controlled the bank account into which the business checks were deposited. One of his partners, Gerald Weiss, was not even authorized to issue checks on the firm's bank account. More importantly, no partnership tax returns were filed for the years in question, and Citron claimed payments to his partners as deductions on his personal income tax returns for 1970, 1971 and 1972. The tax returns of Weiss and William Citron for those years correspondingly reflect these payments as

income. As Engelson testified, defendant himself represented that funds given to William Citron and Gerald Weiss in excess of those listed on Forms 1099 for the years in question constituted loans. The evidence establishes beyond a reasonable doubt that the unreported income the government ascertained by the specific items method of proof was solely attributable to defendant, and that because of his actions of altering his cash receipts book on the evening of February 13, 1974, his exclusion of income on his tax returns was willful. Defendant remains silent at his peril.

Based on the evidence as described above, I find that the defendant is guilty as charged of willfully attempting to evade a substantial portion of his income tax for the years 1970, 1971, and 1972.

An order denying defendant's motion for suppression of evidence or for a

rehearing, and denying his motion for a judgment of acquittal, is entered herewith.

/s/ John Feikens

JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHER DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v. CRIMINAL NO. 7-80926

ERNEST L. CITRON,

Defendant

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ORDER

At a session of said Court held in the Federal Building at Detroit on the 19th day of June, 1980

PRESENT: THE HONORABLE JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

In accordance with the accompanying opinion, and based on the findings of fact and the reasons set forth therein, I find the defendant guilty as charged of willfully attempting to evade a substantial portion of his income tax due and owing for the years 1970, 1971 and 1972, and

IT IS ORDERED that defendant's motion for suppression of evidence or for a rehearing, and his motion for a judgment of acquittal, be, and the same hereby are, DENIED.

/s/ John Feikens

JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

No. 80-1670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
ERNEST L. CITRON,	)	
Defendant-Appellant.	)	

Before: EDWARDS & KENNEDY, Circuit Judges, CELEBREZZE, Senior Circuit Judge.

Ernest Citron appeals from his conviction by the district court on three counts of willfully attempting to evade federal income taxes in violation of 26 U.S.C. Sec. 7201. At trial the government demonstrated that appellant,

an attorney, had intentionally understated his income from legal fees for the years 1970, 1971, and 1972. This was established through the introduction of photocopies of appellant's business records which had been made by an IRS Agent, allegedly with appellant's consent.

In 1973, Agent Engelson of the Internal Revenue Service was participating in a tax investigation of Tako Peshkopia, a suspected narcotics trafficker. In the course of the Peshkopia assignment, Engelson learned that Peshkopia was a client of appellant's, and that appellant had purchased a beauty shop from Peshkopia . The beauty shop's records indicated that within a six month period in 1972, sums in excess of $220,000 were deposited in the shop's account, withdrawn, and redeposited in the appellant's law firm account. Suspicious of this activity, Agent

Engelson met the appellant at his law office. Engelson informed appellant that he was assigned to audit appellant's tax returns, but did not inform him of the nature of the interest.

The audit process proceeded amicably, and appellant provided Engelson with access to the records in the firm. Engelson was hand-copying some of those records, but apparently appellant suggested that the Agent take the records with him and photocopy them. Appellant later asserted that he had only given the Agent permission to take certain check registers, but that Engelson took many records, such as his cash receipts. Engelson made photocopies of all the records, and it was the introduction of those records which appellant asserts constitutes reversible error. Specifically, appellant argues that the records were removed without his consent; that even if consent were given,

it was obtained by fraud and deceit; and that even if the consent was legitimately obtained, the entire investigation was in violation of IRS regulations. These contentions are without merit.

The district court conducted a hearing after which it concluded that appellant had voluntarily consented to the removal of the records. We see no basis for holding this finding to be clearly erroneous. We must also reject appellant's assertion that his consent was induced by fraud, as our review of the record reveals no affirmative misrepresentations as are required by our decision in United States v. Stribling, 437 F.2d 765 (6th Cir. 1971). Finally, even if the audit here was commenced in technical violation of IRS regulations, that procedural irregularity alone does not afford the defendant any right to suppression of the evidence. See United

States v. Cacares, 440 U.S. 741 (1979).

We have examined the other issues raised by appellant and find them to be without merit. The decision of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

April 28, 1981
